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No. _____

**In The
Supreme Court of the United States**

OCTOBER TERM: 1982

LOUIS DEJOHN, SR.
Plaintiff-Appellee,
VERSUS
SAM VINCE
Defendant-Petitioner.

**On Writ of Certiorari
to the Supreme Court of the State of Louisiana
and/or the Court of Appeal,
First Circuit, State of Louisiana**

**Petition of
SAM VINCE, Defendant-Petitioner,
for a Writ of Certiorari**

Respectfully submitted
BY ATTORNEY
FRANZ JOSEPH BADDOCK
P. O. Box 3573
Baton Rouge, Louisiana 70821
(Tel.: (504) 343-9194)

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CERTIFICATE OF SERVICE

I certify under Rule 28.5. that I have this date, by prepaid mail, forwarded three (3) copies of the foregoing Petition for Certiorari to MR. JAMES J. ZITO, Attorney, 660 Laurel Street-Suite 2, Baton Rouge, Louisiana 70802, who is counsel of record for Louis DeJohn, Sr., as required by Rule 28.3.

I further certify under Rule 28.5. that all parties to this proceeding required to be served have thus been served, and that other than LOUIS DeJOHN, SR. and PETITIONER, there are no other parties to this proceeding.

BATON ROUGE, LOUISIANA, March 12, 1983.

/s/ FRANZ JOSEPH BADDOCK

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**Petition of
SAM VINCE, Defendant-Petitioner,
for a Writ of Certiorari**

THE QUESTIONS PRESENTED FOR REVIEW

(1) When all *pleadings*, *discovery*, and *depositions* on file in a civil defamation action brought by a "public official" show conclusively that such official could *neither* allege facts *nor* produce facts, to support his action within the rules of *Garrison v. State of Louisiana*, *supra*, *New York Times v. Sullivan*, *supra*, and other leading authorities, can a state deny appellate review to a defendant, of these deficiencies, and insist that the defendant nevertheless undergo trial thereon, on the

grounds that he would suffer no "irreparable injury" as a result?

(2) Can a state through concealment, deny uniform application of its laws and decisions to a defendant in a civil matter, in order to circumvent and nullify effect of *Garrison v. State of Louisiana*, *New York Times v. Sullivan*, and other leading Federal Jurisprudence?

(3) When a state imposes appellate review costs and those of a JURY TRIAL on a defendant, can it be said that such defendant would suffer no "irreparable injury" if ultimate liabilities for such costs were discharged by the plaintiff through bankruptcy?

It is believed that 28 USCA 1257(c), 28 USCA 2101 (c), and to whatever extent necessary, 28 USCA 1651 as well as RULE 21 of this Court, confer jurisdiction on this Court to review the judgement or decree in question by Writ of Certiorari.

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grounds that he would suffer no "irreparable injury" as a result?

(2) Can a state through concealment, deny uniform application of its laws and decisions to a defendant in a civil matter, in order to circumvent and nullify effect of *Garrison v. State of Louisiana*, *New York Times v. Sullivan*, and other leading Federal Jurisprudence?

(3) When a state imposes appellate review costs and those of a JURY TRIAL on a defendant, can it be said that such defendant would suffer no "irreparable injury" if ultimate liabilities for such costs were discharged by the plaintiff through bankruptcy?

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked because of the language from *Time, Inc. v. McInaney*, supra, 406 F.2d at page 566:

"The subject matter of this litigation, involving, as it does, the very serious and timely question of how far the First Amendment guarantee of freedom (of speech) . . . may still be impinged upon by actions for libel, places some cases in a somewhat different category. This follows when the trial court and this court jointly consider that *the failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed.2d 22, because of the chilling effect of such litigation.*" (underscore and () ours)

and also the language from *Washington Post Co. v. Keogh*, supra 365 F.2d at page 968:

"In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. . . . Unless persons . . . desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues . . . will become less uninhibited, less robust, and less wide open. . . ." (underscore ours),

both of which quotations are reaffirmed in *Bon Air Hotel, Inc. v. Time, Inc.*, supra, 426 F.2d at page 865.

Jurisdiction is predicated on the language from *Garrison v. State of Louisiana*, supra, 85 S. Ct. at pages 212, 215, 216, and 217:

"(1) In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed.2d 686, we held that the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280, 84 S. Ct. at 726."

* * * * *

"(6-9) Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and ascertainment of truth."

* * * * *

We held in *New York Times* that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true."

* * * * *

"... And since "... erroneous statement is inevitable in free debate, ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive' ...," 376 U.S., at 271-272, 84 S. Ct. at 721, only those false statements made with the high degree of awareness of their probable falsity ... may be the subject of ... civil ... sanctions."

* * * * *

"... The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants."

See also: *Thompson v. Evening Star Newspaper Co.*, *supra*.

Jurisdiction of this court is invoked because the Louisiana courts have literally "torn to shreds", the language above.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This matter involves the UNITED STATES CONSTITUTION, Amendments I and XIV thereof; 11 U.S.C. Sections 301, 303, 523; the LOUISIANA CODE OF CIVIL PROCEDURE, Articles 854, 891, 968, 1154, 2083, and 2123; and LOUISIANA REVISED STATUTES Title 13: 3050.

STATEMENT OF THE CASE

LOUIS DeJOHN, SR., alleging himself to be a member of the Plumbing Board for the City of Baton Rouge and Parish of East Baton Rouge, Louisiana, filed suit for defamation against SAM VINCE in the 19th JDC of Louisiana (see: Appendix). The gravamen of his complaint appears to be that

"The defendant told the Plumbing Board that the petitioner had made statements to the effect that no one would ever receive a Class A master plumbing license as long as he was a member of the Plumbing Board because the petitioner did not want any further competition in the City of Baton Rouge."

Considerable discovery in the form of interrogatories and depositions were procured. (Excerpts from the deposition of LOUIS DeJOHN, SR. appear in the Appendix.) Against this action, SAM VINCE filed an *EXCEPTION OF NO CAUSE OF ACTION* (in Appendix) based on *New York Times Co. v. Sullivan*, supra, *Garrison v. State of Louisiana*, supra and other authorities.

In overruling this exception, the District Judge said:

"All they have to do is allege malice. I don't know that there is any—the courts have said "actual malice" but you have malice, and that's it. I DON'T KNOW THAT TACKING ON THE WORD "ACTUAL" MEANS ONE BIT OF DIFFERENCE, AND IT DOESN'T TO THIS COURT." (Caps and underscore ours—see: Appendix)

After rendition and signing of a judgment dismissing the exception (Appendix) SAM VINCE petitioned

for and obtained a *suspensive* appeal to the Court of Appeal, First Circuit, State of Louisiana, conditioned upon his posting bond in the amount of Five Hundred (\$500.00) Dollars. This petition (Appendix) was predicated on failure to give effect to *Sullivan* and *Garrison*, supra, and also alleged irreparable injury because of the requirement of LRS 13:3050 requiring Defendant to post additional bond for a JURY TRIAL, and the lack of guarantee that Defendant would be able to recover his "costs" and "expenses" from the plaintiff, EVEN IN EVENT DEFENDANT WERE ULTIMATELY SUCCESSFUL!

On October 12, 1982, without hearing oral argument, the Court of Appeal dismissed the Appeal of SAM VINCE in a decision "Not Designated for Publication" (see: Appendix). In seeking rehearing on the basis of the same *Garrison* and *Sullivan* cases, the Court of Appeals denied same on December 16, 1982, again in a decree "Not Designated for Publication" (see: Appendix)

On an application to the Supreme Court of the State of Louisiana for a Writ of Certiorari, that Court denied the Writ on February 4, 1983 without dealing with either *Garrison* or *Sullivan* (see: Appendix)

Deeming that Constitutional Rights were being denied to the defendant SAM VINCE, we brought the matter to this Court on a Petition for a Writ of Certiorari.

A DIRECT AND CONCISE ARGUMENT

Since Louisiana disallows any appeal from a refusal to grant summary judgment (Art. 968 LCCP), our only remedy was appeal under Art. 2083 of the same Code.

If this were merely a bad decision, we would not be here on Petition for Certiorari. Rather, the record shows the extent to which Louisiana has, in effect, condoned widespread circumvention of *Garrison v. State of Louisiana*, supra, and *New York Times Company v. Sullivan*, supra, as well as the other important Federal authorities!

In attempting to justify its assertion that "irreparable injury" does not result from a party being required to bear the normal costs of a trial by judge OR BY JURY (Caps ours)", the Court of Appeal relies upon four (4) cases—*NONE* of which involved TRIAL BY JURY. *Sulik*, ante, did not! *Trice*, ante, did not! *Green*, ante, did not! *State ex rel Guste* did not!

In worse fashion, the Court of Appeal employs the same four (4) authorities in a case involving the basic Constitutional Guarantees of FREE SPEECH! But *Sulik*, did not involve any such Constitutional Guarantees! Neither did *Trice*, nor *Green*, nor *State ex rel Guste*!

Neither does the Court of Appeal question that LRS 13:3050 requires a party praying for a JURY TRIAL to post bond to cover such costs, nor the fact that such costs are dischargeable through bankruptcy, under 11 U.S.C. 523.

AND, under *Green*, although the Appeal was dismissed, the court ordered that:

"All costs incurred herein are to await the final determination hereof." (194 So2d 400)

In the *instant* case, the Appeal of SAM VINCE is dismissed by the Court of Appeal AT APPELLANTS

COSTS! *WHY* this difference in treatment? No explanation is afforded in the decision.

In its treatment of "irreparable injury," the Court of Appeal shows a shocking lack of acceptance of Louisiana jurisprudence! For example, the Court of Appeal says that

"Irreparable injury could only result when the costs of a trial would be extraordinarily or unusually high."

Since its decree is "Not Designated for Publication," the Bar will have no opportunity to judge the "just" quality thereof. But the realistic truth is: All matters being relative, the incurring of costs for a JURY TRIAL in the instant case is *more* injurious to a plumber than the costs of litigation is to a multi-billion-dollar corporation, such as the one (GENERAL MOTORS CORPORATION) in *State ex rel Guste*, ante!

Further, the Court of Appeal discriminated against SAM VINCE by ignoring its own authority of *Brown v. Courtney*, supra, wherein the Court said (64 So2d 15, 16):

"As was stated in the case of *Item Co. v. Li Rocchi*, 9 La. App. 42, 118 So. 833,

"*'It is not necessary however, that the injury should be absolutely irreparable;*

* * * * *

"*'If this final decree cannot replace the party in the advantageous position which he occupied before the interlocutory judgment, the injury is irreparable.'*

. . .

* * * * *

"*'That said order or decree may cause . . . irreparable injury is possibly not apparent on the face of*

the record, but, as an appeal is a remedy that is favored in law, we prefer, in a case of doubt, rather to sustain than deny the right." (underscore ours)

The underscored above has *substantial* support in Louisiana Jurisprudence! See: *Succession of BOTHICK, Molero v. Bass, Hollingsworth v. Caldwell, Farmers Supply Company v. Williams*, all *supra*, and a host of other authorities found in annotations under Art. 2083 LCCP! All of these have been literally "ripped to shreds" as well as *McInaney, Keogh, and Bon Air Hotel, Inc.*, *supra*!

Unfortunately, destruction and discrimination does not stop here, for, Article 854 of the Louisiana Code of Civil Procedure requires "All allegations of *fact* of the petition . . . shall be simple, *concise*, and *direct* . . ." (underscore ours), while the innumerable citations thereunder attest to the degree that such allegations **MUST BE EXPLICIT!** (Louisiana utilizes "fact" pleading, in contrast to the "notice" pleading under federal practice.)

Article 1154 of the same Code (LCCP), authorizes a party **TO OBJECT** to evidence which seeks to enlarge pleadings, or raise issues not raised therein! Again, citations thereunder are legion! Article 891 of the same Code, in addition to requiring a petition to conform to Articles 853, 854, and 863, mandates that the petition "shall contain . . . **THE MATERIAL FACTS UPON WHICH THE CAUSE OF ACTION IS BASED** (Caps and underscore ours). *Cox v. Heroman*, Sup. 1974, *supra*, deems all of these Articles mandatory and essen-

tial requirements of Louisiana Practice! (See: 298 So2d 848, 855)

This Court can search the entire petition of plaintiff and find NOT A SINGLE ALLEGED MATERIAL FACT *either* that the Defendant made the alleged statement WITH KNOWLEDGE THAT IT WAS FALSE *or* WITH RECKLESS DISREGARD OF WHETHER IT WAS TRUE OR FALSE!

Such allegations were not made, we respectfully submit, for the simple reasons that plaintiff could *NEITHER* allege them, *NOR* prove them, *AND*, if made, such allegations would be totally untrue!

We emphasize that we are not seeking to rely merely upon the deficiencies of the petition. This Court may wish to notice the *Deposition* of LOUIS DeJOHN, SR., extracts from which are in the Appendix. We quote there from at random:

"BADDOCK: I'm trying to find out how you conclude that he said it with malice towards you.

DeJOHN: Well, you know, I'm a business man and when this kind of hum-bug gets out it can hurt me in my business in the future. . . .

* * * * *

BADDOCK: Well, now, sir, I'm trying to find out, though, at this time not whether your business has been hurt or will be hurt, but on what basis—*what is the factual basis that you are saying that Mr. Vince made the statements with malice towards you?*

MR. ZITO: I'm going to object to any more questions along that line and instruct him not to answer any more questions that would concern a definition

in his mind of which malice constitutes since that is a conclusion of law that this man is not qualified to answer.

* * * * *

BADDOCK: I'm not asking him to give me a definition of malice, sir. What I have asked him and I want to see if you are objecting and having him refuse to answer. *I'm asking him to tell me ON A FACTUAL BASIS what leads him to say in his petition that Mr. Vince made the statements with malice, that's all.*"

MR. ZITO: I think he has answered that and I would object to any more questions about it.

BADDOCK: THEN YOU ARE INSTRUCTING HIM NOT TO ANSWER.

MR. ZITO: *THAT'S RIGHT.*" (Caps and underscore ours)

We respectfully submit it is more than obvious that plaintiff could *neither* allege, *nor* support, any finding of "actual" malice within the rules of *Garrison* and *Sullivan*, *supra*. Unless this Court desires that such suit remain only for *harassment* of the type condemned in *Keogh*, *McLaney*, and *Bon Air Hotel*, *supra*, this proceeding should be summarily dismissed!

We did not purposely overlook the contention whether the alleged remarks of SAM VINCE as quoted in the petition:

"The defendant told the Plumbing Board that the petitioner had made statements to the effect that no one would ever receive a Class A master plumbing license as long as he was a member of the Plumbing Board because the petitioner did not want any further competition in the City of Baton Rouge."

could possibly, by any stretch of the imagination, be defamatory *per se*! It is difficult to surmise how *any* defamation could result from this, and if this Court wishes to resolve such issue on its own, it is free to do so!

Our contention is simply that 1) in heading its decrees "Not Designated for Publication," the Court of Appeal has withheld from the Bar 2) its failure to follow Louisiana and Federal Jurisprudence, 3) its view that "costs" under LRS 13:3050 do not cause "irreparable injury," 4) its failure to give reasons for assessing costs of the instant Appeal *against Defendant* (in conflict with *Green*, ante), 5) the conflict of its decision with Articles 854 and 1154 LCCP, and 6) its failure to disavow that "costs" which Defendant may have to pay, are dischargeable under 11 U.S.C. 523.

Our conclusion from this is that the State of Louisiana has in effect resorted to tactics which circumvent and nullify *Garrison v. State of Louisiana*, supra, and *New York Times v. Sullivan*, supra, insofar as these decisions affect the "public officials" of the state.

We respectfully submit that circumvention through the "Not Designated for Publication" route, is not the proper method. Instead, the State of Louisiana should request *this Court* to change its decisions, and until changed, such decisions should be followed faithfully!

CONCLUSION AND PRAYER

Since the Supreme Court of Louisiana denied Certiorari without opinion, Petitioner is not positive whether Certiorari from this Court should be issued to that Court, or to the Court of Appeal, First Circuit,

State of Louisiana. It is believed that this problem was confronted by this Court in *International Ladies' Garment Workers Union v. Scherer & Sons, Inc.* 389 U.S. 577, 88 S. Ct. 690, 390 U.S. 717, 88 S. Ct. 1402.

Thus, Petitioner prays that Certiorari be issued to the proper Court and, in accordance with the precedent of *Scherer*, supra, the judgment entered herein be summarily *REVERSED* and the petition of Louis DeJohn *DISMISSED*, on the basis of *Garrison v. State of Louisiana*, *New York Times v. Sullivan*, *Bon Air Hotel, Inc. v. Time, Inc.*, *Cervantes v. Time, Inc.*, *Hurley v. Northwest Publications, Inc.*, *Thompson v. Evening Star Newspaper Co.*, *Time, Inc. v. McInaney*, *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, *Walker v. Pulitzer Publishing Co.*, and *Washington Post Co. v. Keogh*, all supra. And for any and all other relief necessary in these premises.

Respectfully submitted
BY ATTORNEY

/s/ FRANZ JOSEPH BADDOCK

P. O. Box 3573
Baton Rouge, Louisiana 70821
(Tel.: (504) 343-9194)

APPENDIX

**LOUIS DEJOHN, SR.
VERSUS
SAM VINCE
NUMBER 251989 DIVISION M
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA**

SUIT FOR DEFAMATION

NOW INTO COURT, through the undersigned counsel, comes Louis DeJohn, Sr., a resident of the full age of majority and with respect represents:

1.

Made defendant herein is Sam Vince, a resident of the full age of majority and domiciled in the Parish of East Baton Rouge.

2.

The defendant is indebted unto the petitioner in the sum of ONE HUNDRED FIFTY THOUSAND AND NO/100 (\$150,000.00) DOLLARS, together with legal interest thereon from the date of judicial demand until paid and for all costs of these proceedings for the following to wit:

3.

The petitioner, Louis DeJohn, Sr., is a member of the Plumbing Board for the City of Baton Rouge and the Parish of East Baton Rouge.

4.

The petitioner has served in that capacity for a period of sixteen (16) years.

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5.

That in connection therewith, as part of the petitioner's duties and obligations on the Plumbing Board, it is necessary that tests be given to applicants for plumbing licenses and that same be graded by members of the Plumbing Board.

6.

An application to the Plumbing Board was made by a Joseph Polozola to obtain a Class A plumbing license.

7.

The applicant did not make a satisfactory grade on his application, and as such, was refused a master's license by the Plumbing Board at its meeting on November 19, 1981, in the City of Baton Rouge.

8.

At said meeting, the defendant, Sam Vince, was allowed to speak to the Plumbing Board on behalf of the applicant, Polozola.

9.

The defendant, then instead of speaking on behalf of the applicant, began to verbally abuse the petitioner with malice and without provocation of any type whatsoever.

10.

The defendant told the Plumbing Board that the petitioner had made statements to the effect that no one would ever receive a Class A master plumbing license as long as he was a member of the Plumbing Board because

the petitioner did not want any further competition in the City of Baton Rouge.

11.

No such statements were ever made by the petitioner, but because of the malice of the defendant's statements, the petitioner suffered grave humiliation and embarrassment in front of his peers.

12.

The petitioner has been a mechanical contractor in the City of Baton Rouge for a period in excess of twenty-one (21) years in his business known as Louis Mechanical Contractors, Inc.

13.

That in said capacity, the petitioner has earned an outstanding reputation of both honesty and creditability, all of which have been severely damaged by the malicious comments made by the defendant.

14.

As a result thereof, the defendant has damaged petitioner as follows:

Embarrassment and	
Humiliation	\$ 75,000.00
Loss of Business	
Reputation	<u>\$ 75,000.00</u>
TOTAL	\$150,000.00

WHEREFORE, petitioner prays that after due process of legal proceedings, there be judgment herein in his favor and against the defendant, Sam Vince, in the amount of ONE HUNDRED FIFTY THOUSAND AND NO/100 (\$150,000.00) DOLLARS, together with

legal interest thereon from the date of judicial demand until paid and for all costs of these proceedings.

BY ATTORNEY:
/s/ JAMES J. ZITO

660 Laurel Street, Suite 2
Baton Rouge, Louisiana 70802
Telephone: (504) 387-0068

SERVICE INFORMATION:

Sam Vince
8133 Queenswood Court
Baton Rouge, Louisiana

Q: Now, let's go to the final part of your petition here.

Before that can you honestly say under oath that Mr. Vince was making these statements with malice towards you?

A: Yes, sir. You know, I worked for that man for seventeen years and done him a terrific job. Mr. Sam Vince, since he went out of business and I went into business, it hasn't been the same. Why, so God help me, I don't know. I thought I done him a good job and I can't answer why he come and done such a thing. Every time he would see me he wouldn't speak, but this particular instance if he wanted to talk to me about the Polozola boy I don't know why he couldn't call me and say, "DeJohn, if you could

help the boy I would appreciate it." I would have thought the world of Mr. Sam Vince by asking me that question and I would have been as fair as I was anyway but I would have admired him for coming to me and saying, "DeJohn, I wish you could have helped the boy." Why he didn't call me—I have had people ask me these questions, but you have got something to go by and that's the only way to go by. I can't change the answers for them, I wouldn't change the answers for them, I ain't made that way and I ain't going to do it.

Q: Again, sir, I want to clarify for the record, you have established clearly that there was no profanity used by Mr. Vince and there was nothing derogatory said against you as your business capabilities, that is, the ability of a master plumber.

Now, whatever was said by Mr. Vince, I'm trying to find out how you conclude that he said it with malice towards you.

A: Well, you know, I'm a business man and when this kind of hum-bug gets out it can hurt me in my business in the future. I mean, if somebody come out there and said Mr. DeJohn deliberately failed somebody and they say, "Well, if he's no good why should I give him a job or why give him a chance to bid on one of my jobs?" This is where I'm saying it can hurt my business. He done come out with something that's absolutely wrong.

Q: Well, now, sir, I'm trying to find out, though, at this time not whether your business has been hurt or will be hurt, but on what basis—what is the factual

basis that you are saying that Mr. Vince made the statements with malice towards you?

MR. ZITO: I'm going to object to anymore questions along that line and instruct him not to answer anymore questions that would concern a definition in his mind of what malice constitutes since that is a conclusion of law that this man is not qualified to answer.

He has answered the question I think to the best of his ability. Any further answer along those lines would be legal conclusions which he is not qualified to make.

MR. BADDOCK: In other words, you have instructed him not to answer.

MR. ZITO: As to your exact definition of what constituted the malice of Mr. Vince's statement, yes.

MR. BADDOCK: I'm not asking him to give me a definition of malice, sir. What I have asked him and I want to see if you are objecting and having him refuse to answer. I'm asking him to tell me on a factual basis what leads him to say in his petition that Mr. Vince made the statements with malice, that's all.

MR. ZITO: I think he has answered that and I would object to anymore questions about it.

MR. BADDOCK: Then you are instructing him not to answer.

MR. ZITO: That's right.

LOUIS DEJOHN, SR.
VERSUS
SAM VINCE
NUMBER 251,989 DIVISION M
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

EXCEPTION OF NO CAUSE OF ACTION

NOW INTO COURT, through his undersigned counsel, comes SAM VINCE, Defendant-Exceptor who, for purposes of this pleading excepts to the Petition of Plaintiff on the following grounds, to-wit:

1. That under the clear rule announced in *Dyer v. Davis* (Court of Appeal—First Circuit 1966) 189 So2d 678, and its supporting authorities: NEW YORK TIMES CO. v. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed2d 686, and GARRISON v. STATE OF LOUISIANA, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed2d 125, the Petition of Plaintiff fails to state a cause of action against Defendant-Exceptor.

2. That under the above cited cases, the Petition of Plaintiff TOTALLY fails to allege that the alleged words of Defendant-Exceptor (if true) were made with knowledge of their falsity or in reckless disregard of whether they were false or true. *FURTHER*, said Petition of Plaintiff fails, and fails completely, to allege said words were uttered with "actual malice."

WHEREFORE DEFENDANT-EXCEPTOR

prays that the Petition of Plaintiff be DISMISSED at Plaintiff's costs. And for all other relief necessary.

Respectfully submitted

BY ATTORNEY

/s/ FRANZ JOSEPH BADDOCK

Post Office Box 3573

Baton Rouge, Louisiana 70821

(Tel.: (504) 343-9194)

ANNEXED:

Supporting Memorandum

CERTIFICATE: I certify that I have this date, by pre-paid mail, forwarded a copy of the foregoing Exception of No Cause of Action to: MR. JAMES J. ZITO, Attorney, 660 Laurel St. Suite 2 Baton Rouge, Louisiana, 70801. BATON ROUGE, Louisiana, this JULY 10th 1982.

/s/ FRANZ JOSEPH BADDOCK

LOUIS DEJOHN, SR.
 VERSUS
 SAM VINCE
 NUMBER 251,989 DIVISION M
 19TH JUDICIAL DISTRICT COURT
 PARISH OF EAST BATON ROUGE
 STATE OF LOUISIANA

ORAL REASONS FOR JUDGMENT
 THE HONORABLE CHARLES WM. ROBERTS,
 JUDGE PRESIDING
 FRIDAY, AUGUST 6, 1982

As far as malice, that is alleged in three different articles in the petition, Articles IX, XI and XIII, and this Court believes that those are sufficient allegations to allege a cause of action. . . .

* * * * *

(NOTE: Following is discussion between Court and counsel upon completion of rendering oral reasons for judgment.)

MR. BADDOCK: May I just ask this one question, Your Honor, not to question your ruling, but does Your Honor—is it implicit in Your Honor's ruling over the exception that they will be able to introduce evidence of actual malice or that defendant actually knew that this was under the pleadings the way they stand, without amendment?

THE COURT: Yes, sir. *All they have to do is allege malice.* I don't know that there is any—the courts have said “actual malice” but you have malice, and that's it. I DON'T KNOW THAT TACKING ON

THE WORD "ACTUAL" MEANS ONE BIT OF DIFFERENCE, *AND IT DOESN'T TO THIS COURT. . . .*" (Caps and underscore ours for emphasis)

LOUIS DEJOHN, SR.
 VERSUS
 SAM VINCE
 NUMBER 251,989 DIVISION "M"
 19TH JUDICIAL DISTRICT COURT
 PARISH OF EAST BATON ROUGE
 STATE OF LOUISIANA

JUDGMENT

This matter came before the court pursuant to assignment.

Present in court were James J. Zito, representing Louis DeJohn, Sr., and Franz J. Baddock, representing Sam Vince.

The court having considered the law and evidence and for reasons this day orally assigned;

IT IS ORDERED, ADJUDGED AND DECREED that the exception of no cause of action filed by the defendant herein be dismissed, said exception being overruled by this court.

JUDGMENT RENDERED this 6th day of August, 1982.

JUDGMENT READ AND SIGNED this 13th day of August, 1982.

/s/ CHARLES WM. ROBERTS

JUDGE,
 19th Judicial District Court

LOUIS DEJOHN, SR.

VS.

SAM VINCE

No. 251,989 Div. M

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

**PETITION FOR APPEAL UNDER ART. 2083
LOUISIANA CODE OF CIVIL PROCEDURE**

**TO THE HONORABLE THE JUDGES OF THE 19TH
JUDICIAL DISTRICT COURT, IN AND FOR THE
PARISH OF EAST BATON ROUGE, LOUISIANA:**

**The petition of SAM VINCE, Defendant herein, who,
with respect, alleges:**

1.

That a judgment was rendered herein on August 6, 1982—read and signed on August 13, 1982—whereby this Court overruled and dismissed an EXCEPTION OF NO CAUSE OF ACTION filed by the Defendant against the petition of Plaintiff.

2.

Nor your petitioner shows that the overruling and dismissing of his EXCEPTION OF NO CAUSE OF ACTION is a blatant disregard of, and of the refusal of this Court to follow the rule of, settled decisions of the higher Louisiana Courts, and Federal Courts, including decisions of the United States Supreme Court, and that said overruling and dismissal, if not corrected on Appeal, will cause your appearer irreparable damage.

3.

Amplifying some of the settled decisions, your

petitioner mentions NEW YORK TIMES CO. v. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed2d 686; GARRISON v. STATE OF LOUISIANA, 379, U.S. 64, 85 S. Ct. 209, 13 L. Ed2d 125; and *Dyer v. Davis* (Court of Appeal—First Circuit 1966) 189 So2d 678. That these decisions and others of like quality, mandate that a plaintiff *allege and sustain the burden of proof* that a Defendant either 1) KNEW that an alleged statement was false, or 2) Made the statement with such RECKLESS DISREGARD of whether it was false or not—in particular reference to “public officials”—in which category plaintiff either is, or was at the time the exception was disposed of.

4.

That such allegations as are referred to in Art. 3 hereof are TOTALLY LACKING in the petition of plaintiff! That the net effect thereof is to award plaintiff a cause of action where no such action exists, and to relieve plaintiff of the burden of proof mandated by the decisions cited in said Art. 3.

5.

Now your petitioner shows that he will suffer irreparable injury and damage, especially financial damage, to his person and property, for the following reasons, to-wit:

1. That Defendant will have to incur the expenses and obligations of trial, *where no such obligations and expenses would exist, had his exception been sustained!*

2. Said overruling will force Defendant to post bond for a JURY TRIAL, as required by LRS 13:3050, to his detriment and costs.

3. That Defendant will have to file an Answer, and undergo the legal expenses of preparation for trial.

4. *That there is no guarantee that Defendant will be able to recover his "costs" and "expenses" from the plaintiff, EVEN THE COSTS OF A JURY TRIAL, EVEN IN EVENT THE DEFENDANT IS ULTIMATELY SUCCESSFUL.*

Accordingly, your petitioner alleges that there is grave danger that he will suffer irreparable injuries and damages, to his property, unless the decision is reversed on Appeal!

6.

That under the settled weight of authority, your petitioner is entitled to an Appeal from the decision complained of, as a matter of right, some of which authority is:

Farmers Supply Co. v. Williams (App 1959) 107 So2d 544

Brown v. Courtney (App 1953) 64 So2d 15

Hollingsworth v. Caldwell (1940) 193 La. 638 192 So. 83

Succession of Bothick (1899) 52 La. Ann. 1863, 28 So. 458

Batson v. Time, Inc. (App 1974) 298 So2d 100

Succession of Voland (App 1974) 296 So2d 406

Jennings v. Coleman (App 1971) 250 So2d 845

Trice v. Simon (App 1970) 233 So2d 609

Molero v. Bass (App 1966) 190 So2d 141

7.

To entitle Defendant to Appeal, it is unnecessary that Defendant show that injury will be irreparable. It is

sufficient that Defendant shows such injury may become irreparable after a final judgment. THUS, DEFENDANT AVERS THAT SINCE LRS 13:3050 REQUIRES HIM TO POST BOND FOR A JURY TRIAL, THERE IS POSSIBILITY HE MAY BE SADDLED PERMANENTLY WITH THESE COSTS (EVEN IN THE EVENT HE IS ULTIMATELY SUCCESSFUL) SINCE THERE IS NO GUARANTEE THAT PLAINTIFF WILL BE ABLE TO REFUND OR DEFRAY, ULTIMATELY, THESE COSTS.

Wherefore, the premises being considered, your ap-
pearer prays that this District Court 1) enter an
ORDER OF APPEAL to the Louisiana State Court of
Appeal, First Circuit 2) from the Judgment herein ren-
dered August 6, 1982, and read and signed on August 13,
1982, and 3) fix the return date for, and security for,
Defendant's Appeal under Art. 2123 of the Louisiana
Code of Civil Procedure. AND FOR ALL OTHER RE-
LIEF NECESSARY HEREIN.

Respectfully submitted

BY ATTORNEY

/s/ FRANZ JOSEPH BADDOCK

P. O. Box 3573

Baton Rouge, Louisiana 70821

(Tel.: (504) 343-9194)

BOND
LOUIS DEJOHN, SR.
VS.
SAM VINCE
No. 251,989 Div. M
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

ORDER

Considering the Petition for Appeal under Art. 2083 of the Louisiana Code of Civil Procedure, filed by SAM VINCE, the Defendant herein, from the Judgment of this Court rendered August 6, 1982, read and signed August 13, 1982, overruling and dismissing the EXCEPTION OF NO CAUSE OF ACTION filed by said Defendant,

IT IS ORDERED that an Order of Appeal be entered herein allowing Appeal under Art. 2123 of the Louisiana Code of Civil Procedure, to the Louisiana Court of Appeal, First Circuit, conditioned upon Defendant posting security as required by law in the sum of: Five Hundred and no/100 Dollars.

IT IS FURTHER ORDERED that the return date fixed for this Appeal shall be October 12, 1982.

This Order signed in Chambers at Baton Rouge, Louisiana, on this 25th day of August, 1982.

/s/CHARLES WM. ROBERTS

JUDGE,
19th Judicial District Court

Not Designated for Publication**LOUIS DEJOHN, SR.****VERSUS****SAM VINCE****STATE OF LOUISIANA****COURT OF APPEAL****FIRST CIRCUIT****NUMBER 82 CA 0778****NUMBER 82 CM 0693**

**ON MOTION TO DISMISS APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT,
PARISH OF EAST BATON ROUGE, HONORABLE
CHARLES WM. ROBERTS, JUDGE.**

**BEFORE: COVINGTON, LEAR AND LANIER, JJ.
LANIER, J.**

This is a suit for damages in tort alleging defamation by Louis DeJohn, Sr. against Sam Vince. Vince filed an exception of no cause of action claiming that DeJohn's petition was defective because it failed to allege that the words attributable to Vince "were made with knowledge of their falsity or in reckless disregard of whether they were false or true. . . " and that it failed "to allege said words were uttered with 'actual malice.' " The trial court overruled Vince's exception. Vince then took this suspensive appeal. DeJohn filed a motion to dismiss the appeal on the grounds that the overruling of an exception of no cause of action is interlocutory and does not result in irreparable injury.

A judgment overruling an exception of no cause of action is interlocutory. La.C.C.P. art. 1841; *Brian v. Target, Inc.*, 395 So.2d 372 (La.App. 1st Cir. 1981). An interlocutory judgment is only appealable if it may cause

irreparable injury. La.C.C.P. art. 2083; *Bailey v. Franks Petroleum, Inc.*, 417 So.2d 503 (La.App. 1st Cir. 1982). Vince alleges that irreparable injury may result if this appeal is not entertained because there is a realistic possibility that he may have to pay the costs of a trial by jury, even though he is successful in defending this case. Irreparable injury does not result from a party being required to bear the normal costs of a trial by judge or by jury in a trial court. *Sulik v. Monnerjahn Construction Company, Inc.*, 387 So.2d 46 (La.App. 4th Cir. 1980); *Trice v. Simon*, 233 So.2d 609 (La.App. 3rd Cir. 1970); *Green v. New Orleans Public Service, Inc.*, 194 So.2d 398 (La.App. 4th Cir. 1967). Irreparable injury could only result when the costs of a trial would be extraordinarily or unusually high. *State ex rel. Guste v. General Motors Corporation*, 354 So.2d 770 (La.App. 4th Cir. 1978), affirmed on other grounds 370 So.2d 477 (La. 1979). Vince has not alleged or shown that the costs attendant to this action will be other than those normal in a trial by judge or jury. Accordingly, he has failed to show irreparable injury and thus does not have a *right to appeal* the ruling on the exception.

For the foregoing reasons, the appeal is dismissed at appellant's costs.

APPEAL DISMISSED.

Not Designated for Publication
COURT OF APPEAL, FIRST CIRCUIT,
STATE OF LOUISIANA

LOUIS DEJOHN, SR.

VS.

SAM VINCE

No. 82 CA 0778

No. 82 CM 0693

PARISH OF EAST BATON ROUGE

On Application For Rehearing.

Rehearing Denied

Baton Rouge, Louisiana Dec. 16, 1982

/s/ JOHN S. COVINGTON

/s/ ELMO E. LEAR

/s/ WALTER O. LANIER

**The Supreme Court
of the State of Louisiana**

LOUIS DEJOHN, SR.

VS.

NUMBER 83-C-0080

SAM VINCE

Re: Sam Vince, applying for Writ of Certiorari to the
Court of Appeal, First Circuit, Numbers 82 CA
0778 and 82 CM 0693; 19th JDC, East Baton Rouge
Parish, Number 251,989.

February 4, 1983

Denied. The result is correct.

JLD

JAD

PFC

WFM

FAB

JCW

HTL

Supreme Court of Louisiana

February 4, 1983

/s/ FRANS J. LABRANCHE, JR.

Clerk of Court

For the Court